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No. _____

In The Supreme Court of the United States

ABOLALA SOUDAVAR; SAADI SOUDAVAR,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN; MINISTRY OF INDUSTRYAND MINES OF IRAN; SAZMANE GOSTARESH VANOWSAZI-E IRAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS

1 - Whether for "direct effect" considerations in the context of the FSIA, 28 U.S.C. §1605 (a) (2), the Court of Appeals erred when it altered the meaning of "immediate" - as used in *Republic of Argentina v. Weltover* (504 U.S. 607, 112 S.Ct. 2160) at 618 - and understood no time delay rather than "no intervening element"?

2 - Should direct effects of an expropriation decree with a promise of compensation by a foreign sovereign, in a suit based upon the non-performance of said promise, be pushed back to *the time of the declaration* of the expropriation decree, or should continuing attempts by the foreign sovereign to satisfy said promise be viewed as causing direct effects *beyond* the time of such declaration?

3 - Whether the Court of Appeals erred when it turned - through incorrect translation - a foreign agency into an organ of government in order to nullify an agency-specific immunity waiver stipulated in an international treaty?

4 - Whether the *Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran,* June, 16, 1957; 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93, confers jurisdiction in a US court to an Iranian residing in the United States, for the inadequacy of compensation offers concerning properties taken by the Islamic Government of Iran?

LIST OF PARTIES - All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

PETITION FOR WRIT OF CERTIORARI

Petitioners Abolala Soudavar and Saadi Soudavar ("Soudavars") respectfully request that the decision of the United States Court of Appeals for the Fifth Circuit rendered in favor of Defendants, the Islamic Republic of Iran and Ministry of Industry and Mines (individually and collectively "Iran"), and Sazmane Gostaresh va Nowsazi Iran ("SNGI"), be reversed for the reasons set forth herein.

I. OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 186 F.3d 671 (5th Cir.(Tex.), Sep 07, 1999) (No. 99-20018). The opinion of the District Court (Appendix B) is not reported as yet.

II. JURISDICTION

A. The Court of Appeals for the Fifth Circuit vacated the district court's dismissal for failure to state a claim and dismissed the suit for lack of subject matter jurisdiction.

B. The decision of the Court of Appeals was entered on September 7, 1999. No petition for rehearing was filed.

C. The jurisdiction of this Court is conferred by 28 U.S.C. §1254 (1).

III. STATUTORY PROVISIONS

The Foreign Sovereign Immunities Act ("FSIA")

§1603. Definitions

For purposes of this chapter-

....

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

....

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Treaty of Amity

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, June, 16, 1957; 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93 ("Treaty of Amity")

The United States of America and Iran, desirous of emphasizing the friendly relations which have prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, ...

Article III. 2. Nationals and companies of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy of such access without any requirement of registration or domestication.

Article IV (in relevant parts): Property of nationals and companies of either High Contracting Party, including interest in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Article XI.4: No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or business activity within the territory of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgement or other liability to which privately owned and controlled enterprises are subject therein.

IV. STATEMENT OF THE CASE

The relevant facts - all undisputed by Iran and SNGI – as presented to the Court of Appeals (Appendix C, pp. 2-5) are as follows:

1. In July of 1979, the Revolutionary Islamic Government of Iran decreed the nationalization of certain sectors of Iranian industry. The decree was subsequently promulgated into law: the Law for the Preservation and Expansion of Iranian Industries ("LPEII"). The LPEII and its by-laws effectively set the *ground rules* for a government takeover of the Khawar Industrial Group ("KIG") that included compensation on a fair value basis of the shares to be determined by a third party - a certified public accountant - with a provision for objection and protest.
2. In July of 1979, the Soudavars were major individual shareholders of KIG and Abolala Soudavar was its managing director. However, at that time, Iran controlled a higher percentage of shares - through confiscated shares of the Shah's family (Pahlavi) and through its agencies - than the Soudavar family:

Sazmane Gostaresh Malekiat Vahedhay Towlidi	%27.766

Sherkat Sarmaye-gozariye Melli Iran	%5.887
Pahlavi Family	%6.250
Total shares controlled by Iran	%39.903

Soudavar Family	%24.534
Soufar Trading Company	%5.750
Total shares controlled by Soudavars	%29.284

3. Some four months later, Abolala Soudavar surrendered the *management* of KIG to government representatives while no share transaction was concluded at that time. The surrender was in recognition of Iran's share control and in acceptance of the LPEII promise of fair value compensation for a share transaction yet to come.
4. The Iran-Iraq war effectively put a ten year moratorium on the full implementation of the LPEII and the required purchase and payment of shares.
5. After the conclusion of the Iran-Iraq war, the first bilateral conversation between Soudavars and Defendants came as a result of a gathering organized by Iran and SNGI in New York in May of 1991. During that gathering, Abolala Soudavar had a *one on one* talk with Iran's Minister of Industry and Mines, Nourbakhsh, on the subject of purchase and payment of shares. Nourbakhsh offered to relinquish control and return KIG to Soudavars as an alternative to the implementation of the LPEII.
6. Up to the 1991 New York meeting and for a time after that, the Soudavars remained *registered shareholders* in the books of the company.
7. In a change of tactics, Iran and SNGI proposed in 1992, a new transaction by which KIG's shareholders were offered 2 new shares for each 3 original shares. Each shareholder who accepted this new offer was required to

sign an elaborate *claim waiver* in respect to all previous promises of compensation.

8. Along with the "2/3 swap" offer, Iran and SNGI announced that they would *raise capital* through the sale of KIG shares on the Tehran Stock Exchange (Bourse).
9. The procedure for the implementation of the "2/3 swap" dragged on for 3 more years. Sometime during this period (i.e. after 1991 and most probably in 1992) Iran transferred the ownership of Soudavars' shares in the books of the company to its agency, SNGI.
10. Soudavars learned in 1996 that Iran and SNGI now refused to pay members of the Soudavar family, be it cash or 2/3 swap.
11. From 1979 to the present, the *public company* status of KIG has never been changed but reemphasized in every official announcement.
12. Each year, *profit and loss* statements and balance sheets have been established and auditors have audited the company books as required by the laws that govern Iranian public companies.

V. REASONS FOR GRANTING THE WRIT

We have pled all along jurisdiction through both the FSIA and the Treaty of Amity, and still maintain that both confer US jurisdiction to our suit.

A. FSIA

The District Court rejected our FSIA related arguments contending that the actions of Iran were sovereign in nature and not commercial. We countered with extensive arguments in our appeal brief (Appendix C, pp. 7-12), clearly demonstrating the commercial nature of Iran and SNGI's actions. Two cases, one international, namely *Siderman de Blake v. Republic of Argentina,* 965 F.2d 711

(9th Cir. 1992), and one domestic, namely *Heinz v. Perez*, 242 F.2d 459 (9th Cir., 1957), provided close parallels for the determination of the commercial nature of events. In the former, a foreign soverign took a commercial enterprise and continued to run it as such, and in the latter, one private party took over the management of a company with a promise to compensate the other according to prices that were supposed to be estimated by a third party.

We argued that it did not matter how and why Iran took over the management of KIG, whether through a decree or through a high percentage of share control. What mattered was that it continued to run KIG as a public company and a commercial enterprise while Soudavars remained registered shareholders, and that Iran and SNGI initiated a buyout circa 1992 in conjunction with their decision to raise capital on the Tehran stock exchange.

Perhaps in recognition of the validity of our arguments, the Court of Appeals decided to set aside the sovereign versus commercial issue, and rejected the applicability of the FSIA 1605 (a) (2) exceptions for lack of nexus in the United States. To do so, the Court of Appeals advanced a separate objection in regards to each of the three clauses of FSIA 1605 (a) (2) (Appendix A, pp. 4-5). We shall only contest the last of the three: the objection to the claim based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

1. FSIA 1605 (a) (2) clause 3

The Court of Appeals invokes the authority of *Republic of Argentina v. Weltover* 504 U.S. 607, 112 S.Ct. 2160, and interprets the word "immediate" used therein as one imposing a time constraint for "direct effect"

considerations. The Oxford dictionary though - as most other dictionaries - offers several meanings for this word, including: a) "occurring or done at once and without delay", and b) "having direct effect: without intervening element," *The Oxford Encyclopedic English Dictionary,* Oxford 1991 at 710-11. In a void, the Court of Appeals was free to chose either of these two meanings even though the inclusion of the words "direct effect" in meaning b) makes the latter a better candidate. But the fact is that the Supreme Court didn't use this word arbitrarily: it was approvingly repeating the opinion of the 2nd circuit court where "immediate" is clearly defined as "without intervening element", *Weltover v. Republic of Argentina* 941 F.2d 145, at 152, citing *Upton v. Empire of Iran,* 459 F.Supp. 264, 266 (D.D.C.1978).

The error that stems from this incorrect reference to *Weltover* is compounded by the Court of Appeals' inability to differentiate between the expropriation decree and its implementation. The former suggests its purpose but the latter determines its nature. Our suit relates to the implementation phase of the decree - which we argued to be commercial in nature - and is based upon Iran and SNGI's refusal to pay the promised fair market value of KIG shares, and the inadequacy of their alternative proposals. The Court of Appeals though, considered the expropriation decree of 1979 as the sole basis of our claim and refused to perceive a direct effect in the US for any *subsequent* action of Iran and SNGI beyond the time frame of 1979.

The following arguments clearly invalidate the Court of Appeals' reasoning:

1- The Soudavars remained registered shareholders of KIG up until 1991. Thus *official title* passed on to SNGI circa

1991 (or later), at a time when the Soudavars were US residents.[1]

2- Had the Soudavars accepted the 2/3 offer in 1994, when the share-swap was scheduled, the value of their KIG holdings would have been reduced by one third. Such acceptance would have resulted in a *tax loss* reportable to the IRS in *1994* - an undeniable direct effect in the United States long after 1979.

3- In *Weltover*, by issuing the "Bonods" in late 1982, Argentina accepted certain obligations as to their reimbursement. Similarly, Iran took over KIG in 1979 with the obligation to pay fair market value to its shareholders. Argentina tried to alter the payment schedule and rolled-over its debt in 1986; Iran proposed a reduced compensation with its "2/3 swap offer" in 1992. Neither the *Weltover* plaintiffs nor the Soudavars accepted the alteration of governmental obligations. As with the Soudavars, the contact of the *Weltover* plaintiffs with the US was established much after Argentina first assumed financial obligations for the Bonods in 1982. By the argument of the Court of Appeals, the 1986 rescheduling of payments should be of no consequence to the plaintiffs in *Weltover;* the 1982 date is the one that matters and since the Bonods were not deposited in New York in 1982, no direct effect in the US should be considered! Such reasoning obviously contradicts the Supreme Courts' *Weltover* decision.

4- Had Iran, fully and completely, expropriated KIG in 1979 and refrained to consider compensation thereafter, the Court of Appeals' argument would have been correct. For we would have been in presence of a classical case of expropriation without compensation, where all events are

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[1] Soudavars became residents in 1983 and Saadi Soudavar became a citizen in 1989.

concentrated around the time of the expropriation decree with no further development thereafter. But such is not the case here. Iran took KIG but never denied or rejected its obligations. On the contrary, the Iranian ministerial decree of 1992 which formulated the 2/3 swap offer and the affidavit form to be signed by the acceptors of the 2/3 swap offer, stated that they were all issued in consideration of the obligations contained in the LPEII decree of 1979. These documents fully support our contention that the direct effect time frame for the instant case cannot be restricted to 1979, but continued as Iran and SNGI proposed (and are still proposing) compensation alternatives concerning the obligations undertaken in 1979.

5- Iran undertook certain obligations in 1979 but did not perform. Iran's non-performance is in effect equivalent to a contractual violation. As noted in *Weltover v. Republic of Argentina*, 941 F.2d 145, at 151: "There can be no question that, pursuant to the FSIA, a "direct" effect may occur as the result of a contractual violation. See *Carey v. National Oil Corp.*, 592 F.2d 673, 676-77 (2d Cir.1979) (per curiam)". The direct effect of Iran's non-performance therefore occurred when it offered an inadequate compensation or when it decided to refuse payment.

B. Treaty of Amity

We also pled jurisdiction through the Treaty of Amity. Three articles of said treaty, namely III, IV and XI, were invoked in our appeal brief but the Court of Appeals' abrupt dismissal only addressed the limited waiver of immunity related to article XI.

1. Juridiction through article XI

Citing *Berkowitz v. Islamic Republic of Iran,* 735 F. 2d, 329, 333 (9th Cir. 1984), and *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F. 2d 438, 452 (D.C. Cir. 1990), the Court of Appeals argued that the limited waiver of immunity extends only to enterprises of Iran, not Iran itself (Appendix A, p. 5). This conclusion - which relates to article XI - was never in dispute since we reiterated the same in our appeal brief (Appendix C, p. 20).

The District Court though had made a clear distinction between "Iran" and its "enterprises" (defined in the treaty as "corporations, associations, and government agencies and instrumentalities"). It maintained the immunity of these enterprises not by assimilating them with Iran, but by arguing that Defendants contended not to have engaged in commercial activities and that Plaintiffs "had not disputed this contention" (Appendix B, p. 7). We countered by pointing out that it was only true if the New York discussions were considered to be non-commercial. But since said discussions were commercial negotiations on behalf of SNGI its immunity was to be lifted (Appendix C, p. 20).[2]

The Court of Appeals chose not to decide between the sovereign and the commercial nature of the events (Appendix A, p. 3). We can therefore only presume that its rejection of the applicability of Article XI was based on the consideration that the named entities were governmental departments and not independent entities. Such presumption is supported by the sudden appearance of SNGI's name translation as "Department of Expansion and New Development of Iran" in its opinion (Appendix A, p. 2), a

[2] In our appeal brief we had included the Ministry of Industry and Mines as an Iranian agency because said ministry wears many hats in Iran. But since Iran disputes such status we have dropped it here.

translation that neither we nor Iran had used in our respective briefs. And therein lies the problem. The translation is wrong. We do understand that the courts have discretion to "look beyond the complaint's jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists", *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997); but it seems that in the instant case, the Court of Appeals took one hasty step too many to deny us jurisdiction.

The official translation of SNGI's name into English has always been "Industrial Development and Renovation Organization" or "IDRO," in which "Organization" stands as the translation of the word "Sazmane" in the name of SNGI. "Organization" is the correct translation for this word. The wrong translation (i.e. department) was used once before in *Upton* where Sazmane Havapaymai Keshvari was translated as Department of Civil Aviation. Nevertheless, the D.C. district court confirmed the obvious: "It is undisputed that defendant Iran is a foreign state under section 1603(a), that defendant Department of Civil Aviation is an agency of a foreign state within the meaning of section 1603(b)", *Id.* at 266. Similarly, SNGI (or IDRO) is an enterprise of Iran. It is a for-profit organization originally created to circumvent the Iranian government's employment policies. It is modeled as a company in which all shares belong to the Iranian government and its chairman is the Minister of Industry and Mines.

Significantly, Iran itself only qualified the Ministry of Industry and Mines as an organ of government but did not attempt to treat SNGI as a governmental department (Appendix D, p. 14, note 7 § 3). Since SNGI's enterprise status is undisputed by Defendants we contend that by virtue of the commercial discussions held in New York, and

because of article XI of the Treaty of Amity, SNGI's immunity should be lifted.

One should also note that the "substantial contact" requirement that the Court of Appeals evoked in relation to the first clause of 1605 (a) (2) and 1603 (e) is not applicable here, and cannot control article XI of the Treaty of Amity which only requires engagement in "commercial" or "business activity" as a condition for the abolition of the immunity of government enterprises. The FSIA is in direct conflict with the Treaty of Amity and therefore the 1604 exception is applicable here as per *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428. 109 S. Ct. 683, 692, 102 L. Ed 2d 818 (1989) ("This exception [to FSIA] applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA").

2. Jurisdiction through articles III and IV combined

Inexplicably, the Court of Appeals chose not to comment on rights conferred by articles III and IV as discussed in our appeal brief (Appendix C, pp. 20-23). We shall therefore reiterate our unaddressed arguments:

1. If a US national has the right to sue Iran through the Treaty of Amity or through any other vehicle, then Iranian nationals in the United States shall have equal rights and jurisdictional stature.
2. Since courts have confirmed the rights of US nationals to sue Iran for compensation of property taken by Iran, then the Soudavars as Iranians in the US must have the same jurisdictional rights.

The didactic right evoked in the first point above stems from Article III of the treaty which confers juridical rights to Iranians in the US "in all degrees of jurisdiction" and "upon terms no less favorable than those applicable to

nationals" of the United States "or of any third country." The same didactic reasoning has been used by other courts to determine for instance that citizens of each signatory state must receive "national treatment with respect to ... access to the courts of justice," whether in consideration of the Treaty of Amity when an Iranian national was suing a US corporation (*Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978)), or in consideration of a similar treaty of friendship when an Irish company was suing another Irish entity (*Irish Nationals*, at 91-92). Although the preceding opinions were expressed in consideration of *forum non conveniens* matters and not jurisdictional ones, the applicable principle is the same as in here.[3]

As for the second point above, we had argued that *American International Group v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980) had established the jurisdictional rights of American citizens to sue Iran in a U.S. court in order to obtain full compensation for properties taken by Iran.[4] It was further reaffirmed in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2n 422 (6th Cir. 1984), at 426. Therefore the rights of Iranian nationals can be no less.

Several points need to be emphasized here:

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[3] Similarly, in *Song v. Kim*, 1993 U.S. Dist. Lexis 17713 (D.N.J. 1993), the circuit court reasoned that a similar "national treatment" clause included in the *Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of Korea*, 7th November 1957 "elevat[es] a [foreign] judgement to the status of a sister state judgement" and allows a Korean national to enforce it in New Jersey.

[4] As in the instant case the court in *American International Group* was "not asked to judge the validity of defendants' expropriation of plaintiffs' interests in Iran, but rather defendants' failure, in violation of the Treaty and international law, to make adequate provision for the determination and payment of prompt, adequate, and effective compensation", *Id.* at 524.

a) The American International Group case was referred to The Hague where it was awarded compensation on the basis of rights conferred by the Treaty of Amity.[5] Had it not been for the Algiers accords, the numerous lawsuits against Iran that were channeled to the International court of The Hague would have certainly been filed in US courts. A good portion of the claims and awards at the Hague were ultimately based on the Treaty of Amity.[6]

b) The Treaty of Amity is often labeled, and perceived, as a treaty only concerned with the rights of US nationals versus Iran, and vice versa. Such label or perception perhaps creates a prejudice for the acceptance of a didactic right that allows Iranians in the US to sue Iran for compensation of taken properties. However, nothing in the language of the treaty precludes such a conclusion. To the contrary, since the treaty proclaims at its very beginning the intent of "reaffirming the high principles in the regulation of human affairs,"[7] (before and on par with two other goals: 1- "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples," 2- "regulating consular relations") one can only conclude that the treaty was meant to protect the rights of nationals of both countries in the broadest terms. Thus, our conclusion is not incompatible with such intent.

c) Moreover, to maintain that such didactic reasoning is incompatible with the intent of the Treaty is to accept that the US signed a treaty of *friendship* with a country that did not share the same values or principles,

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[5] See *American International Group, Inc. et al. v. Islamic Republic of Iran, et al.*, Award No. 93-2-3 (19 Dec. 1983), *reprinted in* 4 Iran-US C.T.R. 96.

[6] See for instance G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 218-26.

[7] *Treaty of Amity*, at 901

especially in regards to a fundamental issue such as property rights. One may do business with an unprincipled partner but one does not call him a friend!

d) Should either of the High Contracting Parties feel that these are unforeseen or unwanted outcomes, they have the prerogative to *abrogate* the treaty and limit their exposure.[8] Debasing the sanctity of a bilateral treaty and watering down the meaning of its articles should not be a substitute for abrogation.

e) In *Foremost,* the D.C. circuit court wrongly extended the Supreme Court's *Amerada Hess* decision to the Treaty of Amity. In the latter decision, the Supreme Court first addressed maritime conventions such as the Geneva Convention of the High Seas and the Pan American Maritime Neutrality Convention, and stated:

> "these conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs.FN10. They do not create private rights of action for foreign corporations to recover compensation from foreign states in the United States''; *Amerada Hess* at 692.

Contrary to the maritime conventions, the Treaty of Amity establishes private rights of action for nationals of Iran in U.S. courts.[9]

f) The Supreme Court then dealt with the *Treaty of Friendship, Commerce and Navigation Aug. 8, 1938, United States-Liberia*, separately and untangled from its

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[8] As per Article XXIII (3), the termination of the treaty requires one year advance notice.

[9] Also, none of the two maritime conventions considered in *Amerada Hess* rise in stature to the level of Treaty of Amity. The Treaty of Amity is a bilateral and *self-executing* treaty, approved by a 2/3 majority of the U.S Senate and ratified by the President of the United States as per Art. II of the U.S Constitution. Art. VI of the U.S. Constitution dictates that such treaty is the "supreme Law of the Land."

remarks regarding maritime conventions. It rejected the treaty's relevance to issues of immunity waiver, not because it considered said treaty as mere rules of conduct (as for the maritime conventions) but because the rights conferred therein were subject to conformity to "local laws," and the FSIA was considered one such law; *Amerada Hess*, at 693. Such language does not appear in the Treaty of Amity. The loophole that allowed a drop back into the FSIA in the Liberian treaty does not exist in the Iranian one. The Treaty of Amity can therefore be invoked as an exception to the FSIA.

3. Jurisdiction conferred by Article IV

Iran's debt to the Soudavars is now a property "within US territories" that the United States government is obligated to protect by virtue of Article IV which requires the US to give "the most constant protection and security within" its territories to properties of Iranians, "including interest in property". Thus, the denial of jurisdictional access for the recovery of the full value of Iran's debt to the Soudavars is barred by the Treaty of Amity, which once again is in clear conflict with the FSIA.

VI. CONCLUSION

The following conclusions may thus be derived from the above arguments:

1. The third exception of FSIA 1605(a)2 is applicable here and provides subject matter jurisdiction for this case.
2. The immunity of SNGI should be lifted as per Article XI of the Treaty of Amity and FSIA 1604.

3. The Treaty of Amity confers jurisdiction and the right to seek compensation for the KIG shares taken by Iran.

Finally, in the age of internet, the multiple errors of the Court of Appeals should not remain uncorrected.

Respectfully submitted on December 6th, 1999:

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Appendix A

OPINION OF THE COURT OF APPEALS

186 F.3d 671

Abolala **SOUDAVAR**; Saadi **Soudavar**, Plaintiffs-Appellants,
v.
ISLAMIC REPUBLIC OF IRAN; Ministry of Industry; Mines of Iran; Sazmane
Gostaresh Va Nowsaz-E Iran, Defendants-Appellees.

No. 99-20018

United States Court of Appeals,
Fifth Circuit.

Sept. 7, 1999.

*672 Abolala Soudavar, Houston, TX, pro se.
Saadi Soudavar, Cambridge, MA, pro se.

Bruno Alexander Ristau, Law Offices of Bruno A. Ristau, Washington, DC, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before DAVIS, DUHE and BENAVIDES, Circuit Judges.

*673 DUHE, Circuit Judge:

BACKGROUND

Abolala Soudavar and Saadi Soudavar ("Plaintiffs") were substantial shareholders in the Khawar Industrial Group ("KIG"), one of the largest industrial enterprises in Iran and a licensee of Mercedes-Benz. In 1979, Iran expropriated the Plaintiffs' property and nationalized KIG. Although the law instituting the nationalization made certain provisions for the compensation of KIG's shareholders, the Plaintiffs were never paid.

After the expropriation, the Plaintiffs moved to the United States and Saadi Soudavar has become a United States citizen. In 1991, Iran organized a gathering in New York aimed at persuading Iranian businessmen to return home. At that meeting the Plaintiffs asked Iranian officials about the status of their property, and were told to return home if they wanted it back. In 1992, Iran adopted a resolution to compensate parties whose property had been expropriated. Under the resolution, eligible shareholders could elect to receive up to two thirds of the shares previously owned, minus a number of fees. The Plaintiffs elected not to accept this offer. The Plaintiffs allege that Iran later blacklisted them from this offer.

In 1998, the Plaintiffs sued Iran, the Ministry of Industry and Mines, and Sazmane Gostaresh Va Nosaz-e-Iran (Department of Expansion and New Development of Iran) (collectively "Iran"). Iran moved to dismiss under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction and, alternatively, under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted Iran's Rule 12(b)(6) motion and dismissed the case without prejudice but did not address Iran's Rule 12(b)(1) motion. The Plaintiffs appeal.

DISCUSSION

Citing the Foreign Sovereign Immunities Act ("FSIA") and the Treaty of Amity, the Plaintiffs argue that the district erred by dismissing their suit. For the following reasons, we vacate the district court's dismissal for failure to state a claim and dismiss the suit for lack of subject matter jurisdiction.

I. Foreign Sovereign Immunities Act

[1] Generally, foreign sovereigns are "immune from the jurisdiction of the courts of the United States." 28 U.S.C.A. § 1604 (West 1994). "Under the FSIA, a court in the United States can exercise subject matter jurisdiction over a foreign sovereign only if an exception to sovereign immunity applies." Stena Rederi AB v. Comision de Contratos, 923 F.2d 380, 386 (5th Cir.1991); 28 U.S.C.A. § 1605 (West 1994 & Supp.1999) (listing exceptions

to immunity). In this case, the Plaintiffs rely on the commercial activities exception to sovereign immunity. See § 1605(a)(2). [FN1]

> FN1. The Defendant argues that the takings in violation of international law exception is also inapplicable. See 28 U.S.C.A. § 1605(a)(3). The Plaintiffs do not rely on this exception and, thus, we need not address it.

[2][3] In determining whether the commercial activity exception applies, we ask three questions: (1) "whether the particular conduct giving rise to the claim in question constitutes or is in connection with commercial activity;" (2) whether the relevant activity is sovereign or commercial; and (3) whether the commercial activity has the requisite jurisdictional nexus with the United States. de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir.1985). In the instant case, the district court answered the second question, concluding that the acts complained of were sovereign rather than commercial. In Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 708-09 (9th Cir.1992), the Ninth Circuit reached a different conclusion in a case with similar facts. In that case, Argentina expropriated the plaintiffs' hotel and retained the *674 profits from its continued operation. The Ninth Circuit characterized Argentina's continuing management of the hotel as commercial, reasoning that Argentina's activities were "of a kind in which a private party might engage." Id. In this case, the acts complained of, whether sovereign or commercial, lack the requisite jurisdictional nexus with the United States. Therefore, we need not decide whether the acts were sovereign or commercial.

The FSIA lists three types of acts which have the requisite jurisdictional nexus with the United States:

> [1] a commercial activity carried on in the United States by the foreign state; ... [2] an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; ... [3] an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C.A. § 1605(a)(2).

First, the Plaintiffs argue that by meeting with Abolala Soudavar in New York in 1991, Iran carried on commercial activity in the United States. We disagree. "Under the FSIA, commercial activity carried on in the United States must have 'substantial contact with the United States.' " Stena, 923 F.2d at 389 n. 11 (quoting 28 U.S.C.A. § 1603(e) (West 1994)). In Stena, we concluded that a single visit to Texas by a representative of a nationalized Mexican petroleum company did not constitute substantial contact with the United States. See id. Similarly, the Iranian representative's visit to New York did not constitute substantial contact with the United States.

Second, the Plaintiffs maintain that jurisdiction is proper because the New York meeting constituted an "act performed in the United States in connection with a commercial activity of [Iran] elsewhere." 28 U.S.C.A. § 1605(a)(2). This argument fails because the Plaintiffs' causes of action are not based on representations made at the meeting. See Stena, 923 F.2d at 388 (stating that "[u]nder the plain language of the FSIA, the plaintiff's action must be based upon the act performed in the United States."). The meeting was designed to persuade Iranian businessmen to return to Iran. When the parties discussed compensation for the KIG shares, the Iranian representative told Abolala Soudavar to return to Iran if he wanted his company back. This statement is not the basis of the Plaintiffs' suit. It is clear from the complaint that the Plaintiffs' suit is based on Iran's refusal to follow its own law calling for remuneration for expropriating the Plaintiffs' property.

[4] Third, the Plaintiffs' contend that we have jurisdiction over this matter because Iran's refusal to pay for the expropriated shares caused direct effects in the United States--lost income and lost tax revenue. We disagree. "[A]n effect is direct if it follows as an immediate consequence of the defendant's activity." Republic of Argentina v. Weltover, 504U.S. 607, 112 S.Ct. 2160, 2168, 119 L.Ed.2d 394 (1992). At the time of the expropriation, the Plaintiffs lived in Iran and their property was in Iran. Hence, the financial loss, occurred in Iran. The fact that the Plaintiffs have since become United States residents does not alter this analysis.

[FN2]

FN2. The Plaintiffs argue that, as shareholders in KIG, Iranian law required that they be notified at their United States addresses by registered mail about share-related decisions. Relying on dicta from a Ninth Circuit case, they argue that the mailing requirement provides the direct effect in the United States. See Siderman de Blake, 965 F.2d at 711. We find the Ninth Circuit's dicta unpersuasive.

II. The Treaty of Amity

[5] The Plaintiffs also argue that we have jurisdiction over this cased based on the Treat of Amity. Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 8 U.S.T. 899. We disagree. The limited ***675** waiver of immunity in the Treaty of Amity "extends only to enterprises of Iran, not Iran itself." Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 333 (9th Cir.1984); see Foremost- McKesson v. Islamic Republic of Iran, 905 F.2d 438, 452 (D.C.Cir.1990).

CONCLUSION

We vacate the district court's dismissal and dismiss the case for lack of subject matter jurisdiction.

VACATED; DISMISSED.

Appendix B

DISTRICT COURT'S OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABOLALA SOUDAVAR AND SAADI SOUDAVAR	}	
Plaintiff,	}	
vs.	}	CIVIL ACTION
	}	NO. H-98-0908
ISLAMIC REPUBLIC OF IRAN, MINISTRY OF INDUSTRY AND MINES OF IRAN AND SAZMANE,	}	
Defendants.	}	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendants' motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) (Instrument #4). Upon reviewing the motion and supporting brief, the record, the responses, and considering the applicable law, the Court is of the opinion that Defendant's motion to dismiss should be **GRANTED**.

I. FACTUAL BACKGROUND

Plaintiffs were Iranian citizens who had their property expropriated by Iran when the country nationalized automobile manufacturing plants after the 1979 revolution. Plaintiffs were substantial shareholders in the Khawar Industrial Group ("KIG"), which was one of the largest industrial enterprises in Iran and a licensee of Mercedes-Benz of Germany.

The law instituting the nationalization provided for the remuneration of property taken; but, Plaintiffs were never paid. After the expropriation, both men came to the United States, and Saadi Soudavar has since become an American citizen.

In May of 1991, Iran organized "a two-day gathering in New York City for the purpose of explaining the government's new economic policies in the aftermath of the Iran-Iraq war (which for eight years had effectively paralyzed the government)." Plaintiff's Complaint, p.5. Iran's new "economic policies" were aimed at persuading Iranian businessmen to return home. The meeting was attended by several key officials of the Iranian government, as well as both Plaintiffs. When the Plaintiffs inquired about the status of their property, they were told to return to Iran if they wanted it back.

The next year, Iran adopted a resolution to remunerate parties that had their property expropriated. Each party could elect to accept 2/3 of their previous number of shares held, minus a number of fees. Plaintiffs did not accept this offer because they believed that the fees would render the amount meaningless. Plaintiffs had also heard they were "blacklisted" from accepting this offer.

Plaintiffs filed this lawsuit to recover the amount they are entitled to be remunerated. Plaintiffs allege that Iran breached the law that provided for remuneration of their property. Plaintiffs also allege that Iran, through oral representations, official decrees, and official publications, "reaffirmed its commitment to honor its obligations under Iranian law to provide compensation." Plaintiffs have sued for misrepresentation based upon Iran's failure to live up to these statements.

III. ANALYSIS

A. Standard

A court may dismiss a claim for failure to state a claim upon which relief can be granted if it appears, beyond doubt, that a plaintiff can prove no set of facts in support of

his claim that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41,45-46, 78 S.Ct. 99, 101-02, 2 L.Ed. 2d 80 (1957); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677F.2d 1045, 1050 (5th Cir. 1982). In making such a determination, the Court accepts, as true, all well pleaded facts and construes that complaint liberally in favor of the plaintiff. *Kaiser*, 677 F.2d at 1050. Conclusory allegations are not accepted as true in evaluating whether a claim has been stated. *Id.*

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et, seq.*, provides the sole basis for obtaining jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed 2d 181 (1989); *Pere v Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998). The FSIA includes agents or instrumentalities of a foreign state within the definition of "foreign state." *Pere*, 150 F.3d at 480. A foreign state is "immune from the jurisdiction of the courts of the United States and of the States" unless the foreign state's conduct falls within of the FSIA's exceptions. 28 U.S.C. §§ 1604, 1605-07, *Argentine Republic*, 488 U.S. at 434, 109 S. Ct. at 688; *McKesson Corp, v. Islamic Republic of Iran*, 52F.3d 346, 349 (D.C. Cir. 1995).

B. Does the Commercial Activity Exception Apply?

Plaintiffs have alleged that the "commercial activity" exception permits this Court to exercise jurisdiction over Iran and its instrumentalities.[1] "The commercial activity exception is the most frequently argued of the sovereign-immunity exceptions. It antedates the FSIA and embodies the 'restrictive theory' of sovereign immunity, under which a foreign state is immune only from suits based on their public as opposed to their commercial acts—their

[1] The Defendants spend a great deal of their briefing arguing that the non-commercial tort and expropriation exceptions do not apply. This is somewhat interesting in that Plaintiffs have only argued that the "commercial activity" and treaty exceptions apply.

jure imperii as opposed to their *jure gestionis*."*de Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1390 (5th Cir. 1985). This exception abrogates sovereign immunity in any case based upon a foreign state's commercial activity that has a jurisdictional nexus with the United States. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (citing 28 U.S.C. § 1605 (a)(2)).

In ascertaining whether the commercial activity exception applies, three questions are involved, *de Sanchez*, 770 F.2d at 1391. First, the relevant activity must be defined with precision. This requires focusing on the acts of the named defendant, not on other acts that may have had a casual connection with the suit. *de Sanchez*, 770 F.2d at 1391 (citing *Callejo V. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). Second, the Court must determine whether the relevant activity is sovereign or commercial—a label which depends on the nature of the activity rather than on its purpose. 28 U.S.C. § 1603 (d). An activity has a commercial nature for purposes of FSIA immunity if it "is of a type that a private person would customarily engage in for profit." *See Republic of Argentina v. Weltover, Inc.* 504 U.S. 607, 112 S.Ct. 2160, 2165-67, 119 L.Ed. 2d 394 (1992); *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1384 (5th Cir. 1992). Finally, if the activity is commercial in nature, the Court must determine whether it had the requisite jurisdictional nexus with the United States.

There are two activities at issue in this case. The actual expropriation of Plaintiffs' property and Iran's refusal to follow its law calling for remuneration for the expropriation. The Plaintiffs contend that they are only suing upon the latter activity and attempt to characterize it as a "breach of contract" or "misrepresentation." No matter how the activity is characterized, Iran's breach of its own law to remunerate parties for property expropriated from them is not the sort of activity that a private citizen would customarily engage in. Thus, its nature is not commercial.

In Plaintiffs' briefing, they also attempt to name a third relevant activity, *i.e.*, the meeting in New York where Iranian officials attempted to entice Iranian businessmen back to Iran after the war. Assuming that this is a relevant activity, it is not commercial. Private citizens do not institute meetings in foreign countries to attempt to persuade their fellow countrymen to return home after a war.

C. The Treaty of Amity

Plaintiffs next contend that under the Treaty of Amity, Iran waived its sovereign immunity.[2] Plaintiffs

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[2] Article IV of the Treaty of Amity provides, in relevant part:

1. Each High Contracting party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired right and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

2.Property of nationals and companies of either High Contracting Party, including interests in property, shall receive that most constant protection and security within the territories of the other High Contracting party, in no case less than that required by international law. Such property shall not be taken except for a pubic purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

....

4. Enterprises which national and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and

contend that the "treaty exception" of the FSIA is applicable. Sections 1604 and 1605 (a)(1) of the FSIA determine the effect of the Treaty of Amity. Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 451 (D.C. Cir. 1990). Section 1604 provides in relevant part: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. "This exception [to FSIA] applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA." *Argentine Republic*, 488 U.S. 428, 109 S.Ct. at 692; *Foremost-McKesson, Inc.* 905 F.2d at 451. No such express conflict occurs with the Treaty of Amity because it "set[s] forth substantive rules of conduct" and does "not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Foremost-McKesson, Inc.*, 905 F.2d at 451-52 (quoting *Argentine Republic*, 488 U.S. 428, 109 S.Ct. at 692).

In addition, pursuant to section 1605(a)(1), if the Treaty of Amity contained an explicit waiver of sovereign immunity, the foreign state would not be entitled to immunity under FSIA. *Foremost-McKesson, Inc.*, 905 F.2d at 452; *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329,333 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S.Ct.510, 83 L. Ed.2d 401 (1984). However, the only express provision for waiver of sovereign immunity under the Treaty of Amity is found in Article XI, paragraph 4:

> other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do all other things necessary or incidental to the effective conduct of their affairs.

Treaty of Amity, Economic Relations, and Consular Right, June 16, 1957, U.S.-Iran, art. IV, para: 2, art. XL, para. 4, 8 U.S.T. 899.

> No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from...suit...

8 U.S.T. at 908. This "limited waiver" "extends only to enterprises of Iran, not Iran itself" and "extends only to enterprises 'doing business' in the United States." *Foremost-McKesson, Inc.*, 905 F.2d at 452; *Berkovitz*, 735 F.2d at 333; see also *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1350 (11t^{h} Cir. 1982) (Treaty requires "doing business" in United States); *Calgarth Invs. Ltd. v. Bank Saderat Iran*, NO.95 CIV.5332 (MBM), 1996 WL 204470(S.D.N.Y.; Apr 26, 1996) ("The application of the Treaty is relatively simple here. The quoted provision waives the sovereign immunity of government agencies of either county that engage in commercial activities within the territory of the other county."), *affd*, 108 F.3d 329 (2nd Cir. 1997); *Jafari V. Islamic Republic of Iran*, 539 F.Supp.209,211 (N.D.III.1982) (concluding that art. XI P 4 of the Treaty of Amity waives immunity of enterprises but not of Iran itself);*Mashayekhi v. Iran*, 515 F.Supp. 41, 43 (D.D.C. 1981) (finding limited waiver of immunity in Article XI).

Because the waiver only applies to "enterprises" of Iran, it does not constitute a waiver of sovereignty by Iran. With regards to Iran's "enterprises," Defendants contend that they "do not now, and have not at any time in the past, engaged in commercial activities in the United States." Defendants' Response to Plaintiffs' Opposition, p.2. The Plaintiffs have not disputed this contention. Further, it is undisputed that the expropriation and refusal to follow its governmental policies took place in

Iran. Thus, the provisions of Article XI, paragraph 4, are not apposite and, for the purposes of the instant case, Defendants did not waive immunity in that treaty.[3] Accordingly, the Court

ORDERS that Defendants Motion to Dismiss is **GRANTED.**

SIGNED at Houston, Texas, this _____ day of November, 1998.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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[3] It is also noteworthy that the Treaty of Amity does not apply to Plaintiff Abolala Soudavar's claims in that his is a citizen of Iran. The Treaty of Amity is a reciprocal agreement. By its plain terms, it only applies to citizens of the "other High Contracting Party." It is not intended to provide rights to Iran's own citizens.

APPENDIX C

APPELLANTS' BRIEF

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No. 99-20018

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ABOLALA SOUDAVAR; SAADI SOUDAVAR
Plaintiffs - Appellants,
v.
ISLAMIC REPUBLIC OF IRAN; MINISTRY OF INDUSTRY AND MINES OF IRAN; SAZMANE GOSTARESH VA NOWSAZI-E IRAN,
Defendants - Appellees.

APPELLANTS' BRIE F

WE THE APPELLANTS, Abolala SOUDAVAR, a national of Iran and Saadi SOUDAVAR, a dual-national, ("SOUDAVARS" or "WE"), who have sought justice for wrongs committed by the ISLAMIC REPUBLIC OF IRAN, MINISTRY OF INDUSTRY OF MINES OF IRAN and SAZMANE GOSTARESH VA NOWSAZI IRAN, (individually and collectively "IRAN"), hereby present our appeal brief.

I. DISTRICT COURT JURISDICTION

Plaintiffs submitted to the District Court a jurisdictional basis that included:

- The *Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran,* June, 16, 1957; 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93 ("Treaty of Amity"); see Doc. 4, p. 2.
- 28 U.S.C. § 1330(a); 28 U.S.C. § 1331; 28 U.S.C. §§1601 et seq., the Foreign Sovereign Immunity Act

("FSIA") or more specifically its sections 1604 and 1605(a); see Doc. 4, pp. 2-3, and Doc. 5, pp. 7-13.

II. APPEAL COURT JURISDICTION

This appeal was initiated pursuant to the District Court's Memorandum Opinion and Order and the Order of Dismissal as final judgement (Doc. 3), signed on Nov. 20 and transmitted on Nov. 23rd, 1998. The appellants' Notice of Appeal was filed on Dec. 21, 1998.

The jurisdiction of this Court is conferred by 28 U.S.C.A. §1291.

III. STATEMENT OF ISSUE

At issue here is the jurisdiction of U.S. courts in a case where properties of Iran nationals, but legal U.S. residents, have been taken without compensation.

IV. RELEVANT FACTS

The relevant facts - all undisputed by IRAN – are as follows:

1. In July of 1979, the Revolutionary Islamic Government of Iran decreed the nationalization of certain sectors of Iranian industry. The decree was subsequently promulgated into law: the Law for the Preservation and Expansion of Iranian Industries ("LPEII"). The LPEII and its by-laws effectively set the *ground rules* for a government takeover of the Khawar Industrial Group ("KIG") that included compensation on a fair value basis of the shares to be determined by a third party - a certified public accountant - with a provision for objection and protest (Doc. 4, p. 9; Doc. 7, p. 6).
2. In July of 1979, the SOUDAVARS were major individual shareholders of KIG and Abolala Soudavar was its managing director. However as listed in Doc. 9, IRAN controlled at that time a higher percentage of shares through its agencies

and the confiscated shares of the Shah's family (Pahlavi), than the Soudavar family :

Sazmane Gostaresh Malekiat Vahedhay Towlidi	%27.766
Sherkat Sarmaye-gozariye Melli Iran	%5.887
Pahlavi Family	%6.250
Total shares controlled by IRAN	%39.903

Soudavar Family	%24.534
Soufar Trading Company	%5.750
Total shares controlled by Soudavars	%29.284

3. Some four months later, Abolala Soudavar peacefully surrendered the *management* of KIG to the government representatives while no share transaction was concluded at that time (Doc. 4, p. 5, §9; Doc. 6, p. 1). The peaceful surrender was in recognition of IRAN's share control and in acceptance of the LPEII promise of fair value compensation for a share transaction yet to come.
4. The Iran-Iraq war effectively put a ten year moratorium on the full implementation of the LPEII and the required purchase and payment of shares (Doc. 4, p. 5, §10)
5. After the conclusion of the Iran-Iraq war, the first bilateral conversation between SOUDAVARS and IRAN came as a result of a gathering organized by IRAN in New York in May of 1991. During that gathering, Abolala Soudavar had a *one on one* talk with Iran's Minister of Industry and Mines, Mr. Nourbakhsh, on the subject of purchase and payment of shares. Mr. Nourbakhsh offered to relinquish control and return KIG to SOUDAVARS as an alternative to the

implementation of the LPEII (Doc. 4, p. 6, §10; Doc. 5, p. 5).

6. Up to the 1991 New York meeting and for a time after that, the SOUDAVARS remained *registered shareholders* in the books of the company (Doc. 4, p. 5, §10; Doc. 5, p. 5).
7. In a change of tactics, IRAN proposed in 1992, a new transaction by which KIG's shareholders were offered 2 new shares for each 3 original shares. Each shareholder who accepted this new offer was required to sign an elaborate *claim waiver* in respect to all previous promises of compensation (Doc. 4, pp. 6-7, §12)
8. Along with the "2/3 offer," IRAN announced that it would *raise capital* through the sale of KIG shares on the Tehran Stock Exchange (Bourse) (Doc. 4, p. 6 §11, Doc. 8).
9. The procedure for the implementation of the "2/3 offer" dragged on for 3 more years. Sometime during this period (i.e. after 1991 and most probably in 1992) IRAN transferred the ownership of SOUDAVARS' shares in the books of the company to its agency, Sazmane Gostaresh va Nowsazi Iran ("SNGI"). This was the first *share transaction* in the implementation of the LPEII.
10. SOUDAVARS learned in 1996 that IRAN now refused to pay members of the Soudavar family, be it cash or 2/3 swap (Doc. 4, p. 7; Doc. 6, p. 2).
11. From 1979 to the present, the statute of KIG as a *public company* was never changed and was reemphasized in every official announcement. Each year, *profit and loss* statements and balance sheets were established and auditors audited the company books as required by the laws that govern Iranian public companies (Doc. 9 and Doc. 12).

V. STANDARD OF REVIEW

The appropriate standard of review for the instant case is whether the District Court "reached an erroneous conclusion on either the facts or the law" (*Irish Nationals Ins. Co. v. Aer Lingus Teoranta,* 739 F.2d 90 (2d Cir. 1984), at 92). We shall contend that it did both.

VI. SUMMARY OF APPELLANTS' ARGUMENTS

The errors in the District Court's judgement can be divided into four parts:

1- The activity upon which WE as plaintiffs have sued IRAN is wrongly labeled as "Iran's breach of its own law" and characterized as non-commercial in nature (Doc. 3, p. 4, §2). WE disagree and shall demonstrate that the facts clearly reveal that while IRAN's promulgation of the LPEII was a sovereign act, its implementation and interaction with SOUDAVARS was not sovereign but commercial in nature, and consisted of activities that a private individual could engage in.

2- The *one on one* discussions held between SOUDAVARS and Minister Nourbakhsh in New York - on the subject of the implementation of the LPEII and the modalities of share transaction between the SOUDAVARS and IRAN - were also characterized as non-commercial (Doc. 3, p. 4, §3). WE disagree and contend that firstly, said discussions should have been dissociated from the general gathering of Iranian expatriates in New York, and secondly they were part of an attempt by IRAN to alter the conditions of a transaction that was meant to create a legal transfer of shares from SOUDAVARS to IRAN. It was commercial in nature and very similar to what private parties to a commercial transaction often do.

3- In reviewing the relevance of the Treaty of Amity to this case the District Court contends that the treaty only sets forth substantive rules of conduct that do not confer private rights of action, and that it does not contain an *explicit* waiver of immunity (Doc. 3, pp. 4-5). WE believe: that the District Court erred when it focused on an article with no direct relevance to this case, that other articles of the Treaty of Amity grant full jurisdiction to the SOUDAVARS to pursue IRAN in U.S. courts, and that the provisions of the Treaty of Amity can be construed as an *implicit* waiver of sovereign immunity in this respect.

4- The District Court considers the Treaty of Amity as a reciprocal agreement that does not apply to Plaintiff Abolala Soudavar as a citizen of Iran in a suit against IRAN (Doc. 3, p. 7, FN3). WE contend that the Treaty of Amity expressly confers equal rights to both U.S. and Iran nationals, and that no distinction should be made in the status of either SOUDAVARS in this case.

Even though WE consider the Treaty of Amity of paramount importance to this case, we shall first discuss the relevance of FSIA exceptions and subsequently expound the implications of the often rejected Treaty of Amity. WE shall argue that jurisdiction is available through *each individually*, and *both in tandem*.

VII. THE FSIA

Jurisdiction can be established through three FSIA exceptions concerning the commercial activities of a foreign state, namely the FSIA1605(a)(2) first, second and third clauses. FSIA 1605(a)(1) shall be considered further below, along with the Treaty of Amity.

A. The Commercial Nature of the activities

For the purpose of determining commerciality for the FSIA, the "nature" of a transaction is controlling and not its "purpose;" *Republic of Argentina v. Weltover,* 504 U.S. 607; 112 S.Ct. 2160 (1992), at 614, 2166. But instead of applying this required purpose/nature dichotomy, the District Court analyzed the long sequence of transactions of this case through a *jure imperii* lens and characterized the actions of IRAN as sovereign and non-commercial. If the same optics were applied to the activities of landmark cases such as *Alfred Dunhill v. Republic of Cuba*, 425 U.S., 96 S.Ct. 1854 (1976) and *Weltover* none would have been recognized as commercial.

The confiscation or taking of private property in international cases invariably arises from governmental decrees or decisions that are sovereign at the declaration stage. What needs to be determined is whether the resulting transactions will remain sovereign and non-commercial at every subsequent stage: "when a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on," *Millen Industries Inc., v. Coordination Council for North American Affairs*, 855 F.2d 879 (D.C. Cir. 1988). In the instant case, the LPEII set the ground rules for the takeover of KIG which *subsequently* resulted in a share transaction that was very much commercial in nature. The claim here arises out of the non-payment of value for a *share transaction* in a *public* company.

To better understand this two-stage process one should perhaps use the analogy of property condemnation by state or municipal decree for a toll-road or stadium. The condemnation decision may be sovereign but the process of property purchase is not. In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985), plaintiff's claim was based on defendant's breach of contract regarding *military* aircraft which was deemed to be a commercial activity, despite *the*

sovereign decision causing the breach and despite the fact that a military aircraft is an instrument of sovereign power.

In order to recognize the commercial nature of governmental actions, the House and Senate reports accompanying the FSIA legislature explain that: "Certainly if an activity is customarily carried on for profit, its commercial nature could be readily assumed." *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6615. And the Supreme Court adds: "in their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can be exercised by private citizens," *Alfred Dunhill* at 704, 1866 (plurality opinion). Perhaps a more trivial criteria should also be added to the previous two: by definition, a sovereign act must be authoritative and not dependent on anybody else's approval or acquiescence. With these criteria in mind let us analyze the present case:

1. IRAN forfeited the sovereign stature of its nationalization law by requiring an independent certified public accountant to establish the fair value of the shares and by appointing an arbitration panel to resolve shareholders' objections or protests in the implementation of the LPEII, much the way *private players* use estimators and arbitrators in company takeovers (e.g. *Heinz v. Perez*, 242 F.2d 459 (9th Cir., 1957), where the seller tried to recover the purchase price of stock sold to a buyer who agreed to pay the actual value thereof which was to be determined by a complicated method, and each party was to designate an accountant to jointly audit the corporate records).
2. If the LPEII implementation was *wholly sovereign*, the SOUDAVARS' names should have been immediately stricken from the KIG

shareholders' book and replaced with the name of a government agency.

3. IRAN took over the *management* of KIG while maintaining its status as a public company and keeping the name of the original shareholders on its registers. It ran KIG for *profit* and published every year its profit and loss statements according to public company obligations.
4. It divested KIG of its textile branch and ran it separately for *profit*.
5. To buyout the shareholders, IRAN raised capital on the stock market.
6. The last three activities, all undertaken prior to the share transaction, are activities that any private person can undertake and are similar to activities recognized as commercial in *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F.Supp. 114, S.D.N.Y.,1988.[1]
7. The full sequence of IRAN's offers and counter-offers leading to the purchase of shares is one that is often practiced by a private party who has the intention to renege on the original conditions of a deal: IRAN first tried to back off from the deal when it proposed to the SOUDAVARS to take back KIG (proposal not accepted) then announced the 2/3 offer, which by definition was 1/3 less than the original number of shares, and found takers for its reduced offer. Private parties to a deal often try many tricks to alter and reduce their original offer.

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[1] Venezuela's *intervention* into internal affairs of banking conglomerate located within her borders was *sufficient commercial activity* to allow exercise of jurisdiction over it under Foreign Sovereign Immunities Act, provided other criteria of Act were met; *L'Europeenne de Banque* at 120.

8. The mere fact that IRAN required the acceptors of the 2/3 offer to sign an elaborate claim waiver indicates that the share transaction between IRAN and KIG shareholders was not conducted in a sovereign manner but in the manner of a private party who wishes to alter the conditions of a deal but needs the consent of the other party.
9. The District Court characterized the New York meeting as sovereign by arguing that only governments are capable to request their nationals to "return home after a war" (Doc. 3, p. 4, §3). This conclusion is wrong on three scores. Firstly, it wrongly assumes that the departure of Iranian businessmen had been caused by the Iran-Iraq war, but many, including the SOUDAVARS, had left well *before* the war. Secondly, the New York meeting included *two* events: one was the *general gathering* organized by IRAN, and the other was the *one on one* discussions between Abolala Soudavar and Minister Nourbakhsh. It is the latter event which is relevant to the instant case. As it was argued above, the Minister's offer to relinquish control and return KIG to the SOUDAVARS should be viewed as part of a full sequence of deal renegotiations that any private citizen can engage in. In the New York phase of the renegotiations, IRAN was trying to back off from the deal. Thirdly, even if the two events are amalgamated together and considered as one, the District Court's characterization is wrong because it only relies on the announced purpose and not the nature of the event as required by the FSIA. The nature of the event was a gathering to request a departed party to come back home. Private citizens do that when they ask their departed spouse to come back (even if they have to go to meet her or him in New York), or ask their

children to come back home, or when they ask feuding partners to forget their grievances and join back the company. It is by no means the sole prerogative of sovereign governments to ask a departed person to return. There is merit here for citing the analogy used in *Alfred Dunhill* where the Supreme Court compared the sovereign immunity claimed by the Cuban Government appointed "interventors" to a similar claim by "a duly commissioned officer of the Turkish Navy" who was the ship master of a vessel named *Gul Djemal* (*The "Gul Djemal,"* 264 U.S. 90 (1924)). The Supreme Court reasoned:

> "it was held that the master's assertion of sovereign immunity was insufficient because his mere representation of his government as master of a commercial ship furnished no basis for assuming he was entitled to represent the sovereign in other capacities. The master of the Gul Djemal claimed the authority to commit an act of state, but the difference is unimportant. In both cases, a party claimed to have the authority to exercise sovereign power. In both, the only authority shown is commercial authority;" *Alfred Dunhill* at 693-94, 1860-61

Here, the District Court accepted the sovereign label for the New York meeting. But, as in *Gul Djemal* and *Alfred Dunhill,* the Minister's talk with Abolala Soudavar was not an exercise in sovereign power. It addressed a specific commercial concern: whether to relinquish the KIG management or proceed with the share transaction.

10. Since the claim here arises from a share transaction, and the failure of IRAN to pay its debt as a consequence of said transaction, the determination of its timing is of crucial importance. The SOUDAVARS were registered shareholders in the company books, at least until 1991. Therefore, the share transaction *necessarily happened later,* perhaps in 1992 - when SOUDAVARS were US residents. At that time, IRAN was managing KIG as a public company and for profit, an activity which is commercial in nature. Thus, every debt arising out of a share transaction pertaining to this public company is also commercial in nature. Therefore IRAN's debt to the SOUDAVARS is commercial in nature.

11. Finally, it is irrelevant how or why IRAN took over the management of KIG in 1979. It only matters that once in control of the company, it forced a *commercial* buyout of company shares *circa* 1992.[2]

12. Whether an independent accountant has set a share price or not, the debt to the SOUDAVARS is upheld by virtue of the delivery of KIG to IRAN. For, such was the verdict in a civil suit:

> "if the third person fails to fix the price under the terms of the contract, without fault of either party, the sale is thereby avoided; but if delivery of any part has been made to the buyer he must pay a reasonable price therefor;" *Aitchison v. Anderson,* 183 F.2d 922, (9th Cir.,1950), at 925 (emphasis added).

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[2] One should also note that the distribution of dividends was suspended while the shares were in the name of the old shareholders, and was resumed immediately after the share transaction.

Having established the commercial nature of the activities upon which our claims are based, we turn to see which clauses of the FSIA are applicable here.

B. Applicability of FSIA 1605 (a)(2) clause 1

This clause allows an exception based "upon a commercial activity carried on in the United States by the foreign state." As argued above, the visit of Mr. Nourbakhsh to New York in 1991 and his discussions with Abolala Soudavar concerning the return of KIG, should be recognized as a commercial activity carried in the U.S. by IRAN. Such interpretation finds further support in this Court's *Stena Rederi AB v. Comision de Contratos del Comite,* 923 F. 2d380, 389 N. 11 (5th Cir. 1991) decision which first defines that a "single contract or course of dealing executed within this nation's boundaries typically will constitute commercial activity carried on in the United States" (emphasis added) and then concludes that claim-related representations in the course of a single visit by a government agent provide jurisdiction under the FSIA:

> "The visit, however, could have a material connection with Stena's negligent misrepresentation claim. Any false statements Captain Mendez Cid made during the visit could provide the very foundation for Stena's claim. Such a causal relationship, although not required, generally will support the district court's exercise of jurisdiction under the FSIA, at least as to the claim in question." *Id.*

By this interpretation, the New York meeting is a "course of dealing" executed within the U.S. boundaries, which provides an exception to the FSIA as per clause 1605 (a)(2) clause 1. It also lifts through the Treaty of Amity (see infra p. 19) the immunity of the two agencies, MINISTRY OF INDUSTRY AND MINES, and the SAZMANE GOSTARESH VA NOWSAZI IRAN.

C. Applicability of FSIA 1605 (a)(2) clause 2

This clause allows an exception based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." Mr. Nourbakhsh's visit to the US and the discussions held with Abolala Soudavar can alternatively be viewed as "an act performed in the US" in connection with IRAN's commercial activity at home, i.e. running KIG as a public company.

D. Applicability of FSIA 1605 (a)(2) clause 3

1605 (a)(2) clause 3 allows an exception based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Here, the "act outside" is the refusal to pay the fair value of KIG shares to the SOUDAVARS, and "the commercial activity elsewhere" is the running of KIG and the series of representations acknowledging IRAN's commitment to pay fair market value to KIG shareholders. What remains to be demonstrated is the "direct effect" in the US. This "direct effect" reveals itself in three different ways:

U.S. residency – The KIG share transaction and the non-payment of share-value to the SOUDAVARS create the same "direct effect" in the instant case as the one held in *Callejo v. Bancomer S.A.* 764 F.2d 1101 (5th Cir. 1985) where a Mexican bank, Bancomer, tried to alter payment conditions on certificate of deposits issued to U.S. residents. Bancomer had been nationalized and in compliance with newly proclaimed exchange control regulations, offered to pay back the CDs in pesos instead of dollars. The reduced pesos-denominated payback offer was judged to have a direct effect in the U.S. because it affected U.S. residents and was foreseeable. Among the cases referred to in *Callejo*, was *Harris Corp. v. National Iranian & Television,* 691 F.2d 1344, 1351 (11th Cir. 1982) in which the demand for payment on a letter of credit of an American bank was

deemed to have a direct effect in the U.S. because it caused "a depletion of funds in the American bank." The non-payment of share-value by IRAN has obviously caused a depletion of SOUDAVARS funds in the U.S. It affects the SOUDAVARS' income and as a consequence, their *U.S. income tax.*[3] Moreover the transaction on KIG shares occurred *circa* 1992, in the wake of the New York meeting, and at a time when the SOUDAVARS were already U.S. residents. Consequently its effect in the U.S. was *foreseeable*, and IRAN was fully aware of it. It is also *substantial* because SOUDAVARS' claims amount to some 14 million dollars plus interest. Therefore, even when judged by the pre-*Weltover* standards that required "direct effect" to be *foreseeable* and *substantial,* the non-payment of share values by IRAN has a direct effect in the U.S. This effect is further amplified if one considers that some ten KIG shareholders who, as yet haven't joined this lawsuit, are U.S. residents or citizens (see Doc. 5, p.14; Doc. 6, p. 2; and Doc. 10).

Notification by registered mail - KIG was established as a "public" company in Iran. Its status has remained unchanged since 1979. According to the Commerce Laws of Iran, public companies with name-bearing shares are required to notify shareholder by registered mail for share-related decisions such as capital increase and stock-splits (Doc. 11). KIG's adherence to this notification requirement is acknowledged in its public notices and newspaper announcements (Doc. 12). Said announcements never excluded residents in foreign lands as non-eligible to receive notifications. As the SOUDAVARS became U.S. residents in 1983 and prior to the share transaction date, they had to be notified at their new *place of residence* about any and all share transactions affecting their

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[3] By virtue of their residency, the SOUDAVARS are liable to pay U.S. income tax on their revenues. This creates a much stronger effect in the U.S. than for instance the foreign entities in *Weltover* who had temporarily deposited their "Bonods" in a New York bank.

rights. This mailing requirement provides a "direct effect" for clause 3, equivalent to the one considered in *Siderman de Blake v. Republic of Argentina,* 965 F.2d 711 (9th Cir. 1992) :

> "if INOSA's articles of incorporation or by-laws (or the equivalent corporate documents under Argentine law) require INOSA to pay those dividends at the shareholder place of residence, the United States, we believe in light of *Meadows* that the direct effect requirement would be satisfied," (emphasis added);*Id.*

1. **U.S. Policy ramifications** - IRAN has often been accused, sometimes justly and sometimes unjustly, of carrying activities against the interest of the U.S. and harmful to its citizens, and it has been labeled as a "rogue" government for its lack of respect for international law. What is lost in the debate is that a government cannot have respect for international law without first having respect for its own laws. Nineteen years after the 1979 Islamic Revolution, arbitrary expropriation decisions by kangaroo courts and summary decisions by revolutionary tribunals are still routine.[4] This suit does neither stem from a foreign law or from a pre 1979-Revolution law of Iran. It stems from a law promulgated by the very regime that now refuses to honor it. It is a prime example of IRAN's lack of respect for law, any law. Unless IRAN is pressured to respect its own laws it will remain a "rogue" government. And U.S. policies, both domestic and international shall be affected by it.[5] Viewed in a broader perspective, the non-payment

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[4] For example, real estate properties of the SOUDAVARS (unrelated to the KIG) have been expropriated because the Revolutionary Court of the Islamic Republic of Iran accused the SOUDAVARS to be living "in the land of infidels," i.e. in the U.S.

[5] For instance, a US presidential decree bans importation of all goods of Iranian origin. It deprives approximately a million Iranian-Americans of access to goods from their motherland and other Americans to buy

of share-value to the SOUDAVARS, stems from IRAN's lack of respect for law, which directly affects many U.S. policies. This particular direct effect is one that needs to be eliminated. The rulings of this court may be a decision in the right direction.

VIII. THE TREATY OF AMITY

A. Incorrect Extrapolation of Supreme Court Decisions

The District Court quotes *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F2d 438, 451 (D.C. Cir. 1990) and at the same time greatly expands its conclusions by declaring that the Treaty of Amity *as a whole* "set[s] forth substantive rules of conduct" and "does not create private rights of action for foreign corporations to recover compensation from foreign states in the United States courts;" (Doc. 3, p. 6). In *Foremost,* the quotes only referred to Article IV of the Treaty of Amity. The unexplained and unsubstantiated expanded conclusion of the District Court is even more disturbing in light of FN17 of *Foremeost* which categorically states:

> "We do not decide here in what contexts, if any, the Treaty of Amity might constitute a waiver of immunity. We conclude only that the treaty has not effected a waiver in the instant case" (emphasis added), *Foremeost* at 347.

The convoluted language of *Foremost* notwithstanding,[6] we believe that the extension in *Foremost* of the Supreme Court

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Iranian goods such as carpets. This ban has a direct effect in the US and stems out of IRAN's lack of respect for law.

[6] *Foremost's* language becomes convoluted when it mixes seemingly positives ("substantive") with negatives ("does not create private rights...") in one sentence. This can easily lead to confusion. Indeed, in West Publishing abstract no. 13 of *Foremost,* pertaining to INTERNATIONAL LAW, key 10.33, said conclusion has been almost reversed when it states "Treaty *does not* set forth substantive rules of

decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428. 109 S. Ct. 692, 102 L. Ed 2d 818 (1989) to the Treaty of Amity is inappropriate. In that decision, the Supreme Court was addressing international conventions with multiple signatories such as the Geneva Convention of the High Seas and the Pan American Maritime Neutrality Convention, and stated:

> "these conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs.FN10. They do not create private rights of action for foreign corporations to recover compensation from foreign states in the United States." *id.* (emphasis added).

Considering the numerous signatories and participants in such conventions, the Supreme Court's primary concern was the nightmare of a free for all access of unlimited numbers of foreign corporations in suits against foreign state signatories of the conventions.[7] It would have created a situation where US courts had to open their doors to virtually the whole world. Thus the double emphasis on *foreign* in the Supreme Court's language. Since Article III of the treaty grants "national" status to Iranians, this case cannot be considered as *foreign* vs. *foreign* in US courts. Moreover, the conventions considered by the Supreme Court are essentially maritime conventions. They do not deal with *private rights of action* but general obligations and rules of conduct that are not U.S. specific. On the other hand the Treaty of Amity does establish private rights of action for Iran nationals in U.S. courts. Furthermore, none of the two maritime conventions considered in *Argentine Republic* rise in stature to the level of Treaty of Amity. The Treaty of Amity is a bilateral and *self-executing* treaty, approved by a

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conduct and *thus does not bar* application of FSIA" (emphasis added); see Doc. 13.

[7] The Geneva convention alone had 86 signatory nations, see Doc. 14.

2/3 majority of the U.S Senate and ratified by the President of the United States as per Art. II of the U.S Constitution.[8] Such treaty does not set forth mere "rules of conduct." Art. VI of the U.S. Constitution dictates that such treaty is the "supreme Law of the Land."[9] Significantly, the Supreme Court in *Argentine Republic,* at 693, dealt with a similar treaty, the *Treaty of Friendship, Commerce and Navigation Aug. 8, 1938, United States-Liberia*, separately and untangled from its remarks regarding maritime conventions. It rejected the treaty's relevance to issues of immunity waiver, not because it considered said treaty as mere rules of conduct (as for the maritime conventions) but because the rights conferred therein were subject to conformity to "local laws," and the FSIA was considered one such law, Id. at 693. Such restriction does not appear in the Treaty of Amity and therefore, the full potentiality of its clauses should be recognized as for any other Law of the Land.

B. Lack of Immunity for Iran Agencies

The District Court cites a number of cases that rely on Article XI.4 of the Treaty of Amity,[10] and all conclude

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[8] U.S. Const. Art. II.2: "He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

[9] U.S. Const. Art. VI.2:"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

[10] Article XI.4: "No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or business activity within the territory of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution

that the treaty constitutes a "limited waiver" that "extends only to enterprises of Iran, not Iran itself" and "extends only to enterprises doing business in the United Sates" (Doc. 3, p. 6).

Although we agree with the conclusion that this article per se does not abolish the immunity of "Iran itself," we contend that the narrow scope of this article in no way diminishes the power and the value of earlier and more general articles such as Article III. But before analyzing the latter, a preliminary remark is in order:

- Two of the named defendants, MINISTRY OF INDUSTRY OF MINES OF IRAN and SAZMANE GOSTARESH VA NOWSAZI IRAN, are government agencies. The District Court has refused to consider the immunity waiver of Article XI *vis à vis* these two on the premise that: IRAN has contended that neither had engaged in commercial activities in the United States and SOUDAVARS have not "disputed this contention" (Doc. 3, p. 7). This is only true if the New York discussions of Mr. Nourbakhsh are considered to be non-commercial. But if, as argued in section VII.A.9 above, said discussions are deemed to be commercial negotiations on behalf of those two agencies, then the two were involved in a commercial activity conducted in the United States. Consequently, the immunity of these two agencies should be lifted.

C. SOUDAVARS' Jurisdiction and Compensation Rights

Historically, Article XI was meant to deal with the obligation of American companies in Iran and vice versa.[11]

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of judgement or other liability to which privately owned and controlled enterprises are subject therein;" *Treaty of Amity,* at 909.

[11] The Treaty of Amity was concluded in the wake of the nationalization of the Anglo-Iranian Oil Company ("AIOC") by the Iranian parliament in 1951, the subsequent coup d'état organized by the CIA in 1953 to

On the other hand, the earlier sections of the Treaty of Amity, in both spirit and text, address a wider range of issues and rights. With the intent of "reaffirming the high principles in the regulation of human affairs,"[12] the Treaty of Amity protects the rights of nationals of either country in broadest terms:

> Article III. 2. Nationals and companies of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy of such access without any requirement of registration or domestication (emphasis added, *Treaty of Amity*, at 902-903).

The jurisdictional rights referred to in this article are conferred both in absolute terms and didactically: every national of Iran (in this case SOUDAVARS) is empowered to fully pursue his rights and claims within the territories of the other High Contracting Part (in this case the United States) and *upon terms no less favorable* than the rights of a

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overthrow Prime Minister Mossadegh, and the replacement of the AIOC by an American led consortium of oil companies. A major bone of contention leading to the nationalization of the AIOC was its refusal to pay taxes to the Iranian government. It was a remnant of quasi-colonial rule that the Treaty of Amity - and similar treaties of friendship concluded in the post World War II era - wished to erase. Thus the thrust of Article XI was the issue of taxation. As a result, the newly established oil consortium had to pay tax to the Iranian government and operated subject to the laws of Iran.

[12] *Treaty of Amity*, at 901

U.S. national or a national of a third country upon whom the United States might have bestowed higher rights - or procedural facilities - than to its own citizens. Thus, simple Aristotelian syllogism (that if B has certain rights over C and the rights of A are at least equal to C then A shall enjoy the same rights over C) requires that if a US national has the right to sue Iran through the Treaty of Amity or through any other vehicle, then Iranian nationals in the United States shall have equal rights and jurisdictional stature. This didactic reasoning has been used by other courts which have maintained that citizens of each signatory state must receive "national treatment with respect to ... access to the courts of justice," whether in consideration of the Treaty of Amity when an Iranian national was suing a US corporation (*Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978)), or in consideration of a similar treaty of friendship when an *Irish* company was suing another *Irish* entity (*Irish Nationals,* at 91-92). Although the preceding opinions were expressed in consideration of *forum non conveniens* matters and not jurisdictional ones, the applicable principle is the same as here. Also, in *Song v. Kim*, 1993 U.S. Dist. Lexis 17713 (D.N.J. 1993),[13] the circuit court reasoned that a similar "national treatment" clause included in the *Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of Korea*, 7th November 1957 "elevat[es] a [foreign] judgement to the status of a sister state judgement" and allows a Korean national to enforce it in New Jersey.

Furthermore, through Article IV which reads in relevant parts:

> Property of nationals and companies of either High Contracting Party, including interest in property, shall receive the most constant protection and security within the territories of

[13] Said decision quoted *Vagenas v. Continental Gin Co.* 988 F.2d 104, 106 (11th Cir. 1993).

> the other High Contracting Party, in no case less than required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

an American citizen has jurisdiction and can sue Iran in a U.S. court in order to obtain full compensation for properties taken by Iran; see *American International Group v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980), further reaffirmed in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia,* 729 F.2n 422 (6th Cir. 1984), at 426.[14] The rights of Iranian nationals are no less. As in *American International* (at 524) the Court here "is not asked to judge the validity of defendants' expropriation of plaintiffs' interests in Iran, but rather defendants' failure, in violation of the Treaty and international law, to make adequate provision for the determination and payment of prompt, adequate, and effective compensation."

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[14] Kalamazoo, at 427, informs: "There is a striking similarity between the treaty in the present case and the one involved in American International. Both treaties contain similar provisions for compensation when property is expropriated by one of the nations that is a party to the treaty. Consequently, American International provides authoritative guidance to us on the use of the treaty exception, and illustrates the error of the district court's decision that the treaty in this case was too ambiguous to allow a court to exercise jurisdiction. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981) provides an example of the utility of the "prompt, just and effective compensation" standard that is employed in many treaties" (emphasis added).

D. Limited Waiver of Immunity

In deference to the constitutionally ordained significance of international agreements in general, and self-executing treaties in particular, the FSIA excludes, at its very beginning, cases that are covered by these agreements. As noted by the District Court, the Supreme Court has ruled "This exception [to FSIA] applies when international agreements expressly conflict with the immunity provision of the FSIA" (Doc. 3, p. 6, quoting *Argentine Republic*).[15] Here, conflict there is:

- Because, IRAN's recent refusal to *pay the fair value* of SOUDAVARS' shares in KIG can also be construed (Doc. 4, p. 8, §16, and p.10, §17, Doc. 5, p.10) as a taking without compensation and subject to the "prompt payment of just compensation" envisaged in Article IV and the rights emphasized in *Kalamazoo* and *American International* (while keeping in mind that per Article III, U.S. and Iran nationals should be equally treated). Such rights are broader than the more restrictive exceptions envisaged in FSIA 1605(3) where a "commercial activity in the US" is necessary. But no commercial activity

[15] The District Court like many other courts cites : "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state," *Argentine Republic,* Id., as though the Treaty of Amity had no jurisdictional value per se. Had the FSIA not began with the exclusionary term: "Subject to existing international agreements to which the United States is a part..." FSIA 1604, its "last-in-time" status would have overpowered the Treaty of Amity, see Born, G., *International Civil Litigation in United States Courts,* 3rd edition, Boston 1996, p.20. But as it stands it recognizes the precedence of the Treaty of Amity. The Supreme Courts' emphasis on the FSIA as the sole basis for jurisdiction in no way diminishes the exclusionary effect of the 1604 reference to existing international agreements. It simply considers the FSIA as the first gate to all suits against foreign states, and certain international treaties as a door within that gate.

condition is required for the enforcement of the Treaty of Amity.

- Moreover, Article III.2 of the Treaty of Amity requires the U.S. to provide "prompt and impartial justice" in "all degrees of jurisdiction" to SOUDAVARS as nationals of the other High Contracting Party. Such requirement becomes even more pressing in view of the fact that the potential for an alternative impartial justice in Iran is non-existent. Furthermore, it is obvious that the High Contracting Party who has initiated a nationalization, taking or expropriation, is usually the one most reluctant to pay compensation. Therefore, if "prompt and just" compensation is emphasized in the treaty (Article IV), *and in the absence of any indication to the contrary therein, but in conformity with the high ideals announced in the preamble of the treaty*, full jurisdiction must be available in the territories of the *other* High Contracting party to the victimized national of either High Contracting Party, regardless of the nationality of the victim. Otherwise these articles are not effective, meaningless, and unsuitable to be the Law of the Land.[16]

As a signatory of the Treaty of Amity, IRAN has implicitly allowed U.S. jurisdiction in the taking of property without compensation from its own nationals, whether such taking is commercial or not. In *Republic of Argentine*, the Supreme Court rejected the waiver of immunity argument on the presumption that said international agreements contain "no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the

[16] *Kalamazoo* emphasizes that the repeated inclusion of a compensation article (similar to Article IV of the Treaty of Amity) in bilateral international treaties "is evidence that it is an agreed principle in international law," *Kalamazoo*, at 427 and its appendix at 428.

United States;" *Id.* (emphasis added). Articles III and IV of the Treaty of Amity obviously make available a cause of action in the instant case. Moreover, "with respect to implicit waivers, the courts have found such waivers in cases where ... a foreign state has agreed that the law of a particular country should govern a contract (emphasis added); H.R.Rep. No. 1487, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S.Code Cong. & Admin.News, 6604, 6617. Through the bias of Article III of the Treaty of Amity, IRAN has implicitly accepted that the laws of the U.S. govern the payment of compensation to any of its nationals seeking remedy in the U.S. for property taken by IRAN. It is an *implicit* waiver of immunity for such cases, and one that also qualifies as an FSIA 1605 (a)(1) exception.

Should either of the High Contracting Parties feel that these are unforeseen or unwanted outcomes, they have the prerogative to *abrogate* the treaty and limit their exposure.[17] Debasing the sanctity of a bilateral treaty and watering down the meaning of its articles should not be a substitute for abrogation.

IX. CONCLUSION AND PRAYER

The following conclusions may thus be derived from the above analysis:

1. Exceptions to the FSIA, 1605(a)(1) and 1605(a)2, are applicable here and provide jurisdiction for this case.
2. The immunity of the two agencies MINISTRY OF INDUSTRY OF MINES OF IRAN and SAZMANE GOSTARESH VA NOWSAZI IRAN is lifted as per Article XI of the Treaty of Amity.
3. The provisions of the Treaty of Amity apply to both SOUDAVARS, and confer full jurisdiction

[17] As per Article XXIII (3), the termination of the treaty requires one year advance notice.

and the right to seek compensation for the shares of KIG taken without compensation.

4. By signing the Treaty of Amity, IRAN accepted a limited waiver of immunity with respect to suits arising from the taking of property from its own nationals. Such waiver stands while the treaty is in force.

Appellants pray for reversal of the District Court Judgement.

Respectfully submitted on March 4th, 1999:

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Appendix D

EXCERPT FROM

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER AND PERSONAL JURISDICTION AND FAILURE TO STATE A JUSTICIABLE CLAIM
Dated June 18, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CIVIL ACTION No. 98-0908

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OFDEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER AND PERSONAL JURISDICTION AND FAILURE TO STATE A JUSTICIABLE CLAIM

....

C. PLAINTIFFS FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

....

2. The Asserted Claims Are, In Any Event, Time-Barred

We have reviewed with care the Texas statutes of limitations for civil or commercial suits presently in force. The longest statute of limitations appears in Civ. Prac. & Rem. C. §16.008(a), and provides a prescriptive period of 10 years. The most analogous statute of limitations is that which permits suits against the State of Texas or municipalities for an eminent domain takings, is four years, Civ. Prac. Rem. C. §16.051 (limitation period for cause not otherwise specified).

Here the alleged taking of plaintiffs' property occurred in July 1979 – almost twenty years ago. Consequently, the claims are time-barred by the Texas statute of limitations.[7]

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[7] The following additional shortcomings and errors in the complaint and in its service bear noting:

1) Plaintiffs erroneously demand a jury trial; the FSIA bars such trials. See § 1330 (a); Goar v. Compania Peruava de Vapores, 688 F.2d 417 (5th Cir. 1982).

2) Plaintiffs erroneously demand punitive damages against Iran; the FSIA prohibits the award of punitive damages against foreign sovereign states. See § 1606.

3) Plaintiffs erroneously named the Ministry of Industry and Mines of Iran as a defendant. The Ministry is an executive department or

CONCLUSION

For the forgoing reasons, the Court should enter an Order dismissing the instant suit for want of subject-matter and personal jurisdiction and, in the alternative, for failure to state claims upon which relief can be granted.

Respectfully submitted,

Law Offices of Bruno Ristau

Dated: June 18, 1998

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organ of the government of Iran; it is part of the state itself, not an independent juristic entity with capacity to sue or be sues in its own name. See, e.g. Transaero Inc. v. La Fuerga Aerea Boliviana, 30 F.2d 148 (D.C. Cir. 1994).

4) The service of process supposedly made on Iran did not comport with § 1608(a). (No record has been found in Tehran of the summons, complaint notice of suit, and translation thereof into Farsi.) § 1608(a) mandates that mail service be effected by the clerk of the court, not plaintiffs counsel, as was apparently done here. Furthermore, there is no provision in the FSIA for service "on the accredited Ambassadorial Mission of Iran at the United Nations" or at "the Interests Section of Iran under the auspices of the Embassy of Pakistan in Washington"; (Compl.¶ 6). § 1608(a) requires that service by mail be made on "the head of the Ministry of Foreign Affairs".

In an effort to minimize the costs of defending this suit, Iran foregoes challenging the insufficiency of service of process on it in this case.